108 FERC ¶ 61,182
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
Nora Mead Brownell, Joseph T. Kelliher,
and Suedeen G. Kelly.

Southern Star Central Gas Pipeline, Inc.	Docket Nos. RP98-52-051
Pioneer Natural Resources USA, Inc.	SA98-33-003

ORDER ON REHEARING

(Issued August 9, 2004)

1. In this order we deny the rehearing requests of the order issued on March 30, 2004,[1] (the March 30 Order) on review of an Initial Decision (I.D.) issued on December 1, 2003.[2] At issue was the amount of Kansas *ad valorem* tax refunds that were owing to Southern Star Central Gas Pipeline, Inc. (Southern Star)[3] by named producers/first sellers of natural gas, one being Pioneer Natural Resources USA, Inc. (Pioneer).

2. In the I.D., the Administrative Law Judge (ALJ) found that all the producers must make refunds in the amounts Southern Star claimed they owed, and that Pioneer must make refunds at the Commission's interest rate. The March 30 Order affirmed the Initial Decision except as to the rate of interest applicable to the refunds that Pioneer had paid into an escrow account, as to which the Commission held that the escrow account interest rate applied. The order directed Pioneer to make payment within 30 days of the order. The Missouri Public Service Commission (MoPSC) filed for rehearing on the interest rate

[1] 106 FERC ¶61,316 (2004).

[2] 105 FERC ¶63,031 (2003).

[3] Southern Star was previously named Williams Gas Pipelines Central, Inc. (Williams), and that name may appear in this order as well.

ruling, and Pioneer filed a request for rehearing on all the liability rulings arguing that the Commission erred in finding Pioneer liable in the amount claimed by Southern Star. We deny the requests for rehearing, and direct Pioneer to make payment of its refund liability within 15 days of this order, in accordance with the order issued on April 27, 2004.[4]

Background

3. This case involves the Kansas *ad valorem* tax[5] refund liability of a producer of natural gas. The history of this issue has been described in numerous Commission and court cases, including two recent Commission orders involving Pioneer, the March 30 Order, and *Panhandle Eastern Pipe Line Company*,[6] issued June 2, 2004 (*Panhandle)*, and we will not repeat that history here, but will set forth the relevant background to this proceeding.

4. In 1996, in *Public Service Company of Colorado v. FERC*, the United States Court of Appeals for the District of Columbia affirmed the Commission's ruling that the Kansas *ad valorem* tax did not qualify as a severance tax under the Natural Gas Policy Act of 1978 (NGPA), but also held that the Commission had erred in only ordering producers of natural gas to refund any amounts collected through *ad valorem* tax reimbursements that caused them to receive in excess of the maximum lawful price (MLP) under the NGPA beginning June 28, 1988. The court held that the refund period should have extended back to October 3, 1983. Therefore, on September 10, 1997, the Commission issued an order that required producers to refund overcharges associated with the improper reimbursement of Kansas *ad valorem* taxes, together with interest, collected from their customers after October 3, 1983. *Public Service Company of Colorado*, 80 FERC ¶ 61,264 (1997) (*PSC)*. Southern Star is one of the pipelines that is owed refunds related to the improper reimbursement of Kansas *ad valorem* taxes, and it sent Statements of Refunds Due to the producers it claimed owed it refunds, one of whom was Pioneer.

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[4] Pioneer moved to stay the March 30 Order until after the conclusion of all review of that order, including judicial review. The Commission denied the stay, but granted Pioneer an extension of the time within which to pay the refund to Southern Star until 15 days after issuance of a final Commission order, 107 FERC ¶ 61,085 (April 27, 2004).

[5] In some quotes the acronym KAVT is used to refer to the Kansas *ad valorem* tax refund.

[6] !07 FERC ¶ 61,239 (2004).

5. The Commission issued an order on January 3, 2003, *Williams Gas Pipelines Central, Inc., et al.*, 102 FERC ¶ 61,001 (2003) (the Hearing Order) which set for hearing Southern Star's refund claims that had not been resolved through settlements previously approved by the Commission. Those settlements provided, among other things, that state commissions could elect not to be bound by the settlement, and if a state commission did so, its election would also be binding on all parties whose rates are regulated by that state commission. MoPSC so elected. As a result, the settlement did not resolve that portion of the refund obligations of the relevant working interest owners that Southern Star has allocated for flow through to its Missouri customers -- slightly more than 40 percent of the total refunds owed by each producer. The Hearing Order stated that Pioneer owed $10,019,806.96 for these outstanding Missouri refund claims.

6. The Hearing Order listed a number of other producers whose claims were to be litigated. However, certain producers thereafter entered into settlements that would resolve their claims and the Initial Decision did not discuss those producers.[7] Other producers named in the Hearing Order did not appear at the hearing, and the Initial Decision found them in default and ordered them to pay the listed refund amount.

7. As a result, the Initial Decision only addressed the issues relating to Pioneer. Pioneer is the successor to Mesa Operating Limited Partnership (Mesa), and Tenneco Oil Co. (Tenneco). The Kansas *ad valorem* tax reimbursements relate to gas sales made by Mesa and Tenneco to Williams when the NGPA was in effect until the applicable sales contracts with Williams were terminated. Mesa's sales contract was terminated on December 27, 1987, and the Tenneco contract was terminated on March 24, 1988. The issues to be determined were: (1) did Pioneer receive more than the MLP for sales to Southern Star as a result of the reimbursement of the Kansas *ad valorem* taxes, and (2) if so, is waiver of any part of the refund obligation justified?

8. The ALJ rejected all of Pioneer's arguments finding that Commission rulings were contrary to Pioneer's position on each, and that Pioneer must refund the Kansas *ad valorem* tax reimbursement it collected in violation of the MLP. Since Pioneer had placed in an escrow account the full amount of the Kansas *ad valorem* tax that Southern Star claimed it owed, the ALJ addressed the issue of whether the Commission's interest rate, or the lower rate under Pioneer's escrow agreement, applied to the funds in the escrow account The ALJ ruled that the Commission's higher interest rate applied,

[7] The Commission subsequently approved those settlements. *See* 106 FERC ¶ 61,046 and ¶ 61,068 (2004).

"because the amounts put into escrow were amounts over which there was no dispute…"[8] and Pioneer must pay the Commission interest rate "for the amounts that were not in dispute at the time of the escrow…."[9]

9. The March 30 Order affirmed the Initial Decision on all issues, except as to the rate of interest applicable to the refunds that Pioneer placed in an escrow account. The March 30 Order held that the escrow account interest rate applied, and not the FERC interest rate, so no additional amount was due from the difference in the interest rates

I. Pioneer's Rehearing Request

10. In its request for rehearing Pioneer asserts that in finding Pioneer liable, the Commission erred in the following:

a) in rejecting Pioneer's 1989 Settlement with Williams as a basis for relief from refund liability in these proceedings;

b) in denying Pioneer's relief from the royalty portion of the refunds claimed;

c) in its analysis of what price to use in determining whether the MLP was exceeded;

d) in requiring refunds by Pioneer for reimbursements received after January 1, 1988;

e) in not limiting the refund period to from October 4, 1983 through June 28, 1988;

f) in failing to sustain its burden of proof in these proceedings, including examination of the potential mismeasurement of Btu content during the time involved; and

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[8] *Id*. at P 27.

[9] *Id.* P 29. The ALJ also directed the producers in default to pay the amounts set forth in the *ID* at P 28 consisting of Clark Exploration: $311,405.78, Andover Oil: $238,167.24, Steve Smith: $135,574.10, and Williams Brothers Engineering: $140,258.16. We affirm the ALJ's ruling as to these parties.

g) in refusing to find that at least partial relief from the refund claim was appropriate based on the equities presented.

We find no merit in these arguments, as set forth below, and will deny rehearing.

A. The Amount of the Refund

11. Pioneer, in its request, claims that the Commission erred in a number of ways in finding that Pioneer owed the amount of the refund claimed by Panhandle. Pioneer repeats its position "that the Commission's analysis of whether refunds are due must be made based on whether Pioneer received in excess of the applicable MLPs when it received the Kansas *ad valorem* tax reimbursement from Williams."[10] Based on the following facts Pioneer contends that Williams' payments of *ad valorem* tax reimbursements in the period from February through October 1988 did not cause Pioneer to receive in excess of MLP for its sale of natural gas.

12. Mesa and Tenneco both sold gas to Williams under the same contract that was originally entered into in March 1948. That contract was terminated as to Mesa on December 27, 1987, and as to Tenneco on March 24, 1988. It is undisputed that Williams paid Mesa and Tenneco the applicable maximum lawful price for all its purchases under this contract from October 1983 until termination of the contract. Williams paid Mesa and Tenneco several *ad valorem* tax reimbursements after the contracts were terminated in December 1987 and March 1988 respectively. Williams paid tax reimbursements to Mesa in February, April and October 1988, and to Tenneco in April and October 1988. After the termination of their contracts with Williams, Mesa and Tenneco made gas sales to other entities.

13. When Pioneer received Williams' 1988 tax reimbursements, the applicable MLP for sales of the gas formerly subject to the contract with Williams had been increased as permitted by Commission Order No. 451. As a result, Pioneer was selling the gas released from commitment to Williams to others "at market prices which were far less than that Order No. 451 MLP."[11] Pioneer reiterates that to determine whether the applicable ceiling price was exceeded, the MLP when Pioneer received the reimbursement from Williams must be considered. It again argues that because the gas was no longer being sold at the MLP, there was "headroom" below the MLP to recover the *ad valorem* tax reimbursement, and thus no NGPA violation. Pioneer argues that

[10] Rehearing request at 19.

[11] Rehearing request at 22-23.

using the price the producer was receiving for the gas when it received the reimbursement "is even more compelling when viewed from the perspective of the consumer,"[12] and it cites to *Williams Natural Gas Company*, 80 FERC ¶ 61,259 at 61,939 (1997) (*Williams 1997*), in support.

14. The Commission denies rehearing on this issue. The Commission's 2000 Order in *Public Service Co. of Colorado*, specified how the refund obligation would be calculated in light of the Court's ruling in *Anadarko*.[13] The Commission stated:

> Consistent with the Court's ruling, in this order the Commission directs that producers must refund any tax reimbursement collected from their customers after October 4, 1983, *that caused the proceeds from the sale to exceed the maximum lawful price*. Thus, a producer who was collecting the maximum lawful price from its pipeline customers on the sale of regulated gas, must refund in full, plus interest, any lump-sum payment received by that producer from the pipeline after October 4, 1983, that was made to reimburse the producer for the ad valorem tax.[14] (Emphasis supplied).

15. Whether Williams' payments of *ad valorem* tax reimbursement in the February to October 1988 period caused Pioneer to receive more than the MLP turns on which first sales the reimbursements are attributed to. If the payments are attributed to Pioneer's sales to Williams pursuant to the March 1948 gas sales contract before the termination of that contract, then the payment caused Pioneer to receive in excess of MPL since all of Pioneer's sales to Williams under that contract were at the MLP. If, however, as Pioneer argues, the payments are to be attributed to Pioneer's 1988 first sales under its contract with other entities, then Pioneer's receipt of these tax reimbursements from Williams may not have caused it to receive in excess of the MLP because the prices paid by those other entities were at less than the applicable MLP.

16. Pioneer relies on the Commission's 2000 Order in *Public Service Co. of Colorado* in arguing that Williams' 1988 *ad valorem* tax reimbursement must be related to Pioneer's contemporaneous 1988 sales, even though those sales were to other entities. Pioneer points out that in *Public Service* the Commission held that for purposes of

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[12] Rehearing request at 23.

[13] Anadarko Petroleum Corp. v. FERC, 196 F.3d 1264 (D.C. Cir. 1999), *on reh'g*, 200 F.3d 867, *cert. denied*, 530 U.S. 1213 (2000).

[14] 91 FERC ¶ 61,025 at 61,084.

determining whether tax reimbursements related to the period before or after the beginning of the refund period, namely October 1983, the Commission treated all lump sum tax reimbursements paid after October 1983 as related to the post-October 1983 period. Similarly, it contends, the Commission should treat Southern's lump sum *ad valorem* tax reimbursement payments in 1988 as related to the 1988 period in which the payments were made. Therefore, it argues, the Commission should resolve the headroom issue by looking to the price Pioneer received for its sales of gas in 1988, despite the fact those sales were to other entities.

17. Pioneer's reliance on *Public Service* is misplaced. *Public Service* considered a situation where the producer was making sales to a pipeline under an ongoing contract, so that all the sales at issue both before and after the October 1983 refund commencement date were made under the same contract to the same pipeline. In that situation, the Commission held that it did not make sense to seek to attribute the pipeline's lump sum payments to individual sales for purposes of determining whether those payments fell within the post-October 1983 refund period. Rather, the Commission would treat all the pipeline's post-October 1983 lump sum payments as included in the post-October 1983 refund period. The Commission reached this conclusion based on how the *ad valorem* tax reimbursement system worked:

> As a property tax the Kansas ad valorem tax would have been assessed on the value of leasehold property as of January 1 of the tax year. Thus, in October or November of a given calendar year, the Kansas taxing authorities would have rendered a bill to a producer for the taxes due for that same calendar year. The tax bill represented that producer's tax liability only for the year for which the tax bill was rendered, and not for prior years. After the producer received a tax bill, it paid it either as a lump-sum or in two installments, and then invoiced the pipeline for a reimbursement of those paid taxes without regard to the sales made during that year. The pipeline would reimburse the producer for those paid taxes in a lump sum, usually at some point during the year following the tax year in which the bill was rendered. Thus, a producer would have recovered its Kansas ad valorem taxes through lump-sum, after-the-fact payments with respect to each well, and not with respect to individual sales.[15]

18. However, in the same order the Commission recognized that in some situations it might nevertheless be necessary to attribute *ad valorem* tax reimbursements to particular sales for purposes of determining a producer's refund liability. In particular, this could

[15] Public Service of Colorado, 93 FERC ¶ 61,264 at 61,840 (2000).

be necessary to resolve "headroom" contentions, such as Pioneer is raising here. The Commission explained:

> [W]here the producer's sales for the period in the tax bill were made at the MLP, then no attribution is required because the tax is on the property and any reimbursement that the producer receives from the buyer would cause the producer to receive amounts in excess of the MLP for the sale of the gas. Where the producer made sales during the period at less than the MLP and received the tax reimbursement, then it would be necessary calculate what amount of the tax reimbursement was in excess of the MLP. The Commission has always stated that this issue would be determined in individual proceedings with that producer, where all the relevant data would be considered.[16]

19. This is just such an individual case. Here, the Commission finds that resolution of the issue is relatively straight forward. Since the tax reimbursements at issue here were paid to Pioneer by Williams, they clearly relate to Pioneer's sales to Williams pursuant to its contracts with Williams, not to Pioneer's sales pursuant to contracts with other entities. Williams' only contractual obligation with Pioneer was to pay for gas it purchased, not pay for gas others purchased. All of Pioneer's relevant sales to Williams were at the MLP.

20. Southern Star's witness testified that in calculating the refunds Williams listed specific gas contracts:

> "… and the total amount of Kansas *ad valorem* tax reimbursed to producers under each gas purchase contract during the period of time covered by the Commission's orders."
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> * * *
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> After compiling the attached information, Williams reviewed each of the contracts to determine if the producers received the MLP. Williams determined that it paid the MLP under all of the contracts with [**two**] exceptions….

[16] *Id*. at 841.

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> Based on the information available to Williams, it determined that its reimbursement of Kansas ad valorem tax exceeded the MLP except as noted….[17]

21. Pioneer never refuted the evidence submitted by Southern Star to support its calculation of the refund it claimed Pioneer owed. Thus, this case is governed by the following statement in *Public Service*: "For the period in question, it was the norm for natural gas contracts to permit the producer to receive the MLP. In that situation, the *ad valorem* tax reimbursements would exceed the MLP." That the producer might have other contemporaneous contracts with other purchases that did not permit the producer to receive the MLP is irrelevant to determining the refunds owed under contracts that were at the MLP.

22. Pioneer argues that in *Williams 1997*, in determining the amount of refunds received from producers that the pipeline should flow through to each jurisdictional customer, the Commission required the pipeline to match the reimbursements it received in a specific year with each customer's purchases that year, and to not look back when the sales relating to the reimbursement may have taken place. This, Pioneer claims is contrary to the March 30 Order's ruling which looks to a different time period than when the reimbursement was received by the producer. However, the *Williams 1997* case did not involve the amount of the refunds that the producer owed. Rather, it involved how the pipeline was to allocate the refunds it received between jurisdictional and non-jurisdictional customers. Thus, the jurisdictional customers' gas purchases as a percentage of that year's total purchases was used to allocate to the jurisdictional customers' share of the refunds the pipeline collected from producers for that year. The decision has no implication in how to determine whether the producer received more than the MLP or particular sales.

23. Pioneer contends that the Commission erred in requiring it to refund the October 1988 *ad valorem* tax reimbursement for the additional reason that it occurred after June 28, 1988. This, Pioneer argues, improperly expanded the scope of the proceedings because the Commission's order limited the refund period to "the amount collected by Pioneer from October 1983 through June 1988 – nothing more, nothing less."[18] However, Pioneer adds nothing to the same argument that it had raised in its exceptions to the I.D. which the Commission rejected. The March 30 Order stated:

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[17] Witness Johnson, Exhibit JSJ-1, at 5.

[18] Rehearing request at 27.

> Pioneer's argument that the Initial Decision expanded the scope of the proceeding to include reimbursement after June 28, 1988 is rejected. The Commission requires that any reimbursement after October 4, 1983 that resulted in MLP violations must be refunded. The fact that before the Court, in 1999, expanded the period of the refund back from 1988 to 1983 (Anadarko I), the Commission used the June 28, 1988 date does not limit the scope of these proceedings to refunds prior to that date. Pioneer's reliance on the hearing order's reference to the period October 4, 1983 through June 28, 1988, is misplaced since the order merely implemented the Court's expansion of the period of the refund. The hearing order stated that previously the Commission had ordered refunds for MLP violations for the period commencing in 1988 and as a result of the Court's ruling the period would cover 1983 through 1988 as well. In no way did the hearing order exclude MLP violations after June 28, 1988.[19]

24. Pioneer has not shown any error in this explanation, and we reject Pioneer's argument as having no merit.

25. Finally, Pioneer again argues that the Commission had not carried the burden of proof required to show Pioneer owed the refunds claimed by the pipeline. In both the March 30 Order and in *Panhandle,* the Commission found no merit in Pioneer's argument since even if the evidence was introduced by others, this established the violations by Pioneer. Pioneer has not refuted the Commission's rationale, and we again reject the argument.

B. The Mesa Settlement

26. The ALJ rejected Pioneer's argument that a December 1, 1989, Gas Purchase Agreement between its predecessor, Mesa Operating Limited Partnership (Mesa) and Williams (The Mesa Settlement), relieved it of any obligation to pay the Kansas *ad valorem* tax refunds. Article XV of that agreement terminated a number of contracts, including the March 1948 contract under which the sales at issue here were made. Pioneer relies upon Article XVI of the agreement which provides:

> WNG hereby agrees to dismiss with prejudice the litigation currently styled as Williams Natural Gas Co. v. Mesa Operating Limited Partnership and Mesa Midcontinent Limited Partnership, Case No. 11122 in the Chancery Court for the State of Delaware. Both parties

[19] 106 FERC ¶ 61,316 P 27

> hereby forever release and discharge each other from any and all claims, demands, and causes of action, arising out of or relating to the March 12, 1948; May 12, 1982; and May 19, 1982 Gas Purchase Contracts or any other gas purchase contracts listed in the litigation which were raised or could have been raised in the above mentioned lawsuit.[20] However, notwithstanding the above, WNG does not waive, release, or discharge any claims against Mesa, including but not limited to claims for refunds, which may result from the modification, reversal, or vacation of FERC Order No. 451 et seq., as amended or modified, or any order on remand.

The ALJ held that:

> Pioneer's reference to the 1989 Settlement does not help it. That was a settlement of private take-or-pay and related contractual issues that were litigated at that time. It did not cover matters separate from the specific contractual issues between Williams and Mesa at that time (Exh. SSC-3, 4-6). This defense has already been rejected [by] the Commission in Panhandle Eastern Pipe Line Co., et al., 103 FERC ¶ 61,007, at p. 61,023 (2003), and in Burlington Resources Oil and Gas Co., et al., 103 FERC ¶ 61,005 (2003); reh'g denied, 104 FERC ¶ 61,317 (2003). The Commission found that no contractual agreement can negate a producer's obligation to refund taxes in excess of the MLP. Nothing in this record would justify a departure from that ruling.[21]

27. The March 30 Order addressed and rejected the various arguments Pioneer raised in its exceptions, primarily that the ALJ failed to recognize the differences between the Mesa Settlement, and the settlements in the *Burlington* cases, cited by the ALJ, which were held to not relieve the producer of its *ad valorem* refund liability. In its request for rehearing, Pioneer again raises the same argument, which Pioneer states it "has argued in the past, [that] the *Burlington* cases are distinguishable from these proceedings – because

[20] In the lawsuit was Williams contended that the March 1948 contract had been properly terminated under Commission Order No. 451.

[21] 105 FERC at 65,147 P 26.

there are facts at issue here that represent a more complete picture of the 1989 Settlement than was presented for the settlement in the *Burlington* cases and, those facts demonstrate that the 1989 Settlement relieves Pioneer from liability."[22]

28. To support its argument that *Burlington* is not controlling, Pioneer asserts in its request:

> Contrary to the findings in the March 2004 Order, the Commission's decisions in the Burlington cases is not applicable to the 1989 Settlement. The Pioneer/Williams 1989 Settlement was not just a take-or-pay settlement – it resolved all pending issues including potential Kansas ad valorem tax liability given that Williams knew of the pendency of the Kansas ad valorem tax proceedings at that time and potential Kansas ad valorem tax refund liability was not expressly excluded. In addition, there is evidence that Williams knew of the pending Kansas ad valorem tax issue when it executed the Settlement while including no exclusion of those potential refunds.[23]

29. However, the March 30 Order addressed, and rejected, those very arguments, stating at PP 39-41:

> We find no merit in Pioneer's arguments. The "exclusionary" clause Pioneer relies upon, [citation omitted] seems to be related to specific litigation between the parties at the time of the 1989 settlement, and was not intended to cover any other claims. However, even accepting Pioneer's interpretation of the clause, the Commission in Burlington has held that such a clause cannot relieve Pioneer of its obligation to make refunds for MLP violations attributable to Kansas ad valorem tax reimbursements.
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> In Burlington, cited by the ALJ, the Commission rejected the very same argument that Pioneer advances here. The Commission clearly held that any such release cannot relieve a producer of the obligation

[22] Rehearing request at 6. The Commission ruling in *Burlington* rejecting that defense is pending on appeal in the United States Court of Appeals for the District of Columbia in Burlington Resources Oil and Gas Company v. FERC, Nos. 03-1340 and 03-1432.

[23] Rehearing request at 9.

> to refund amounts collected in excess of the NGPA statutory MLPs because that in effect would allow the producer to retain the excess over the MLP in violation of the NGPA.
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> Finally, Pioneer's attempt to distinguish Burlington on the grounds that there the producer did not contest that there was an MLP violation, while here Pioneer has, is logically inconsistent. Disputing whether there was an MLP violation does not have any relevance as to whether if there was such a violation, a private settlement between the producer and the pipeline which the Commission never approved, could relieve that party of its obligation to refund amounts collected in excess of a statutory MLP, which excess had been passed on to the pipeline's customers. Thus, we find no error in the ALJ's ruling that the Mesa Settlement does not relieve Pioneer of its Kansas ad valorem tax refund liability.

30. In its rehearing request, Pioneer again argues that the Mesa settlement resolved all claims between Mesa and Williams, and that "Williams was well aware of the pendency of the Kansas *ad valorem* tax generic proceedings in 1989 when it executed the 1989 Settlement agreement with Pioneer's predecessors"[24] implying that Williams intended to have the *ad valorem* claim covered by the settlement. It contends that it follows that the parties intended to include the *ad valorem* claims under the "release of claims clause" because while the settlement specifically excluded claims that could arise under Order No. 451, the release of claims clause did not refer to excluding *ad valorem* claims so "if Williams had wanted to exclude the potential Kansas *ad valorem* tax liability as part of the release, in the same way it excluded the Order No. 451 payments, Williams could have so written the 1989 Settlement. However, as is clear from the language in Article XVI, there is no such KAVT exception."[25]

31. Pioneer's argument is without merit for a number of reasons. First, even assuming the evidence is clearer in this case than in the *Burlington* cases that the pipeline intended to release its claim for *ad valorem* tax refunds, that would not distinguish this case from *Burlington*. Our holding in *Burlington* did not turn on a finding that the settlement therein was not intended to release the producer of its refund obligation. Rather, in both cases we find that any such provision in a settlement between a first seller and its

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[24] Request at 7, citing Tr. 36, lines 24 through Tr. 37, line 9.

[25] Request at 7-8.

purchaser is unlawful and thus unenforceable. This is because giving effect to such a provision would lead to a result prohibited by NGPA section 504(a)(1) which makes it unlawful "to sell natural gas at a first sale price in excess of any maximum lawful price…"

32. Here, as we have already discussed, Pioneer made first sales to Williams, and Williams' *ad valorem* tax reimbursement payments to Pioneer caused Pioneer to receive more than the MLP from those first sales. The Mesa Settlement which contained the release of claims clause relied on by Pioneer was a private contract between those two parties, that was neither filed with the Commission, nor approved by the Commission Thus, even assuming the release of claims clause in the Mesa Settlement was intended, as Pioneer claims, to allow it to retain the *ad valorem* tax reimbursements, that provision was unlawful and unenforceable. That clause could not relieve Pioneer of its obligation to disgorge the excess amount it collected from the first sale to Williams because the NGPA section 504(a) does not permit it to receive any amount more than the MLP in any first sale. As the Court observed in *Public Service*, "[s]urely Williams' contractual obligation does not extend to paying to producers sums unlawfully recovered."[26]

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[26] 91 F.3d at 1491. In Burlington Resources Oil and Gas Co., 104 FERC ¶ 61,317 (2003) the Commission held that the producer could not rely on an release of claims clause to relieve it of its *ad valorem* refund obligation. The order added, at P 31, that "If it believes that in the 1989 Settlement the pipeline agreed to make the refund, it can assert that claim in a court action against the pipeline (citing *Anadarko*). However, that is not a basis for not paying the refund to the pipeline in the first instance." If that statement is to be read as the Commission implying that such a clause could be enforced in court by a producer to retain the excess over the MLP, the Commission retracts any such implication. In the cited *Anadarko* case the Commission had stated that where there was a dispute between affiliated companies as to who was responsible for the *ad valorem* refund, the producer who was ordered by the Commission to pay the refund could seek recovery from the other parties, including a different producer, based upon a release of claims clause that was included in the "spin-off agreement involving the affiliated companies. *Anadarko Petroleum Corp. v. Pan Energy Pipe Line Co.*," 85 FERC ¶ 61,090 (1998), *reh'g denied*, 86 FERC ¶ 61,040 (1999). While that statement may be correct with respect to a dispute between producers in that affiliated group, it is not correct where the parties are a producer and a pipeline to whom the producer made first sales. In fact, in the *Anadarko* rehearing order the Commission explained that while Anadarko could seek to recover from the affiliated companies any refund it had paid that was required by the Commission's order, it could not seek recovery from Panhandle, the pipeline affiliate, which was the purchaser in the first sale. This was because "an agreement by the buyer, here Panhandle, to be responsible for any refund would in effect

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33. Moreover Pioneer's contention that the release of claims clause applied to the *ad valorem* tax reimbursement refund has no basis. The clause specifically refers to pending litigation in state court commenced by Williams to reform its existing gas purchase contracts with Mesa to get relief from the take-or-pay obligations under those contracts. The clause states that parties under it are released and discharged from all claims relating to the prior contracts "which were raised or could have been raised in the lawsuit." These obviously relate to claims arising from the contract between the parties, and were at issue in the pending lawsuit. The *ad valorem* tax refund is a refund that arises not from the contract, or a claim by one party to the contract against another party to the contract, but from a Commission order requiring all parties to comply with the NGPA, regardless of the terms of any contract the parties may have entered into. The mutual release of claims each party may have against the other in a settlement to which the Commission was not a party, and which was not filed with the Commission for its approval, does not release any claims that arise from Commission orders. Therefore, the Commission may order the producer to comply with the NGPA without violating or modifying the terms of the settlement between the parties. In fact the *ad valorem* refund claim clearly could not have been in any way related to that lawsuit because in 1989, when the Mesa settlement was executed, the Commission had not acted on the Court's 1986 remand on the treatment of the Kansas *ad valorem* tax reimbursement either to declare such payments to be a violation of NGPA maximum lawful prices or to order refunds.

34. Further, Pioneer's assertion that Williams intended to have the *ad valorem* tax refunds covered by the indemnity claims because it was aware of Kansas *ad valorem* tax refund issue but did not exclude it from the clause is not supported by the record. Williams' witness, as referenced by Pioneer in its rehearing request, Tr. 36, lines 24 through Tr. 37, line 9, merely testified as follows:

> Q. In 1989 – in 1988 and 1989, particularly starting third quarter 1988, were you aware of the pendency of this proceeding involving Kansas ad valorem taxes?

(continued)
be an illegal agreement to pay more than the MLP, and thus unenforceable." 86 FERC at 61,158.

> A. I'm sure I was aware that the Kansas ad valorem tax reimbursement was at issue. As far as to specific refunds that would be required, no. The orders were issued later.

35. This hardly supports Pioneer's contention that Williams intended to cover possible refunds that might be ordered if the Commission reversed its prior holding on the Kansas *ad valorem* tax reimbursements. In 1989 when the Mesa Settlement was executed, the Commission had not acted on the Court's 1986 remand. Only in 1993 did the Commission hold that the *ad valorem* tax reimbursement could not be an add-on to the MLP.

36. Pioneer also argues in its request here the same argument that the producer had urged in the *Burlington* cases why the settlement should have relieved it of liability. The argument was that the Commission had held that prior settlements between a pipeline and their customers, approved by the Commission, permitted the pipeline to retain *ad valorem* tax reimbursement refunds received from producers, rather than flowing them through to their customers.[27] The orders cited by Pioneer involved settlements between customers and pipelines, where the customers obtained certain benefits under the settlement, and in exchange gave up certain possible claims, one of which was foregoing refunds the pipeline might recover in the future. Here, the settlement is between the pipeline and the producer. Moreover, in *Burlington,* the Commission rejected reliance on those orders. The Commission stated that while the Commission will allow customers and the pipeline to agree on how an NGPA refund should be treated in the pipeline's NGA jurisdictional rates, that does not mean that the pipeline and producers can agree that the producer can receive more than the MLP for a first regulated under the NGPA, 104 FERC ¶ 61,317 PP 29-30. The same reasons apply here. Thus, there was no error in finding that the prior settlement did not relieve Pioneer of the *ad valorem* refund obligation.

C. The Royalty Owner Interest Issue

37. While recognizing that attempting to recover royalty refunds was "not an enviable task," the March 30 Order found that Pioneer had not demonstrated that it had attempted to determine who the royalty owners were, and also faulted Pioneer for not having the records that would have supplied it with the information on the royalty owners. Thus, the March 30 Order found that Pioneer had not met the standard for waiver of uncollectible

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[27] Pioneer cited the following orders: El Paso Natural Gas Co., 85 FERC ¶ 61,003 (1991), Natural Gas Pipeline Co. of America, 85 FERC ¶ 61,001 (1988), and ANR Pipeline Co., 85 FERC ¶ 61,005 (1998).

refunds from royalty interest owners set forth in *Wylee*, 33 FERC ¶ 61,014 (1985). Further, although acknowledging that the Kansas Statute of Limitations "might bar royalty claims," the Commission concluded that there has been no ruling by a Kansas court on the specific issue, and Pioneer's argument that the Kansas 5-year Statute barred recovery was mere speculation.

38. Pioneer argues that it could not locate the royalty owners, and recites the facts that:

> Pioneer's lack of royalty information is not unreasonable given the history of this case. The fact remains that until August 1996 there was no liability for refunds for the 1983-88 period. Until December 1993 there was no refund liability for Kansas ad valorem tax reimbursements at all. Certainly, it is not unreasonable to expect that in August 1996 a producer would not have detailed royalty information (necessary to seek refunds) for the 1983-88 period.[28]

39. The Commission had recognized this situation, but the March 30 Order stated, at P 47:

> While we recognize that this was not an enviable task, the party seeking relief on this ground must demonstrate that it attempted to determine who the royalty interest owners were. There is nothing in the record to show that these wells in question are not operating. Moreover, to argue, as Pioneer does, that it does not have the records relevant to ownership interest is not a valid defense since the Kansas ad valorem tax issue has been apparent for these many years and Pioneer could, and should have, taken steps to ensure the necessary records were retained. Pioneer admits that its efforts to locate the royalty owners consisted of contacting the association representing royalty owners but nothing more. In short, it argues that it had satisfied the Wylee standard for uncollectibility , 33 FERC ¶ 61,014 (1985) because of the difficulty in trying to actually meet them. We reject that as a basis for granting relief.

40. Pioneer's request does not set forth any new facts that change the Commission's analysis. Pioneer has the burden of presenting evidence showing that it should be exempted from the obligation to refund the royalty owner portion of the *ad valorem* tax reimbursement. Pioneer claims it "has presented evidence that meets at least the last two

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[28] Rehearing request at 13.

standards under *Wylee* – the royalty owners cannot be located and the statute of limitations precludes recovery from royalty owners if they could be identified." In support of the first, that royalty owners could not be located, it argues that:

> Pioneer is the successor to the producers that made the payments to the royalty owners for which refunds are now sought. However, in its acquisitions Pioneer did not obtain detailed information indicating the royalty owners on the wells from which production was sold in 1983-88 under the relevant contracts.[29]

41. Moreover, it contends that "based upon discussions with the Southwest Kansas Royalty Owners Association, even if it knew who the royalty owners during 1983-88 were for the wells at issue, Pioneer has been informed that royalty owners will not refund prior reimbursement."[30] However, Pioneer testified that Mesa handled 100% of the tax reimbursement for the refund period and that "effective August 7, 1997, Parker and Parsley merged with and into Mesa and the name of the resulting company was changed to Pioneer Natural Resources USA, Inc."[31]

42. When Pioneer was created through this merger in August 1997, the Kansas *ad valorem* tax refund liability was established and was no longer open to question. A year earlier, on August 2, 1996, the D.C. Circuit had issued its opinion in *Public Service Company of Colorado*, 91 F.3d 1478, 1492, holding that "Producers are liable to refund all Kansas *ad valorem* taxes collected with respect to production since October 1993." On June 24, 1997, slightly over a month before the merger, Mesa Operating Company itself filed a petition, in Docket No. GP97-5-000, requesting adjustment relief from this refund requirement, which was considered in the Commission's September 10, 1997 order establishing refund procedures.[32] Given that (1) Pioneer was created as a result of a merger "with and into" Mesa, a large and sophisticated producer, and (2) when that merger occurred, Mesa was clearly aware of the requirement to refund 1983-1988 *ad valorem* tax reimbursements, we do not find it credible that at least some records concerning the leases underlying the March 1948 contract were not retained. Pioneer also does not claim that none of leases are still in existence with wells still operating, so at least some of the owners would be receiving payment for their royalty interest which

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[29] Rehearing request at 12.

[30] *Id*.

[31] PNR-1 (KS) at 6.

[32] 80 FERC ¶ 61,264 at 61,949-50.

would enable Pioneer to make some effort to recover the reimbursements from those owners. Instead, as MoPSC's witness testified, that based upon the information furnished during discovery, he could state:

> Pioneer's efforts to collect refunds from royalty owners were limited to reviewing its files for royalty owner information and contact[ing] the Southwest Kansas Royalty Owners Association. See Exhibit PSC-13. When these efforts did not prove successful in identifying royalty owners, Pioneer apparently just gave up. Thus, not only has Pioneer not made any meaningful efforts to collect from royalty owners, it has not even made further efforts to *identify* the royalty owners.[33]

43. Far from contesting this description of its efforts, Pioneer's rehearing request at page 12, gives essentially the same account of its efforts to recover the royalty portion of this refund.

44. Apparently, in recognition of its failure to satisfy the other *Wylee* criteria for uncollectibility, Pioneer contends that even if it had the necessary information and even if it could have attempted to recover through suits or setoffs against royalty owners it would have been futile because "the Kansas Statute of Limitations would likely bar any attempt to recover such payments from the royalty owners,"[34] and the Commission should, and can resolve this issue in Pioneer's favor, rather than leaving it an open question.

45. First, Pioneer contends that contrary to the March 30 Order statement that Pioneer was relying on Kansas' 5-year Statute of Limitations, Pioneer has not taken a position on whether the 5 year statute for written contracts, or the 3 year period for implied contract applied,[35] but "under either SOL Pioneer was foreclosed from recovering the royalty portion of the Kansas *ad valorem* tax refunds long before Pioneer even knew the amount of the Kansas *ad valorem* tax refund claim by Williams."[36] In support of its argument it

[33] Exhibit PSC-1 at 57.

[34] Rehearing request at 13.

[35] Pioneer notes that the two possible limitation statutes are K.S.A. § 60-511 which provides that a cause of action upon an agreement, contract or promise in writing must be brought within 5 years of commencement of action on that written document, and K.S.A. § 60-512 which provides that a cause of action upon expressed or implied (but not written) contracts, obligations or liabilities must be brought within 3 years of the action on which recovery is sought.

[36] Rehearing request at 14.

cites to *Waechter v. Amoco Production Co.*, 217 Kan. 489, 537 P.2d. 228 (1975) (*Waechter*), and *Panhandle Eastern Pipe Line Co. v. Brecheisen*, 323 F.2d 79 (10th Cir., 1963) (*Panhandle Eastern*).

46. The Commission has not foreclosed producers from relying on the generally applicable Kansas statutes of limitations to show that they cannot recover the royalty portion of their *ad valorem* tax reimbursements and thereby meet the *Wylee* standard of uncollectibilitly with respect to that portion of their refund obligation. However, the Commission stated that there are legal issues concerning the applicability of those statutes of limitations that would first have to be resolved, in particular when the producer's cause of action arose so as to commence the running of the statute of limitations.[37] If the cause of action arose when the producers paid the relevant royalties to the royalty owners during 1983-1988, then the statute of limitations would apply to any suit after 1993. If, on the other hand, the cause of action did not arise until the Court issued its 1996 decision requiring refunds back to 1983, then the limitation period would run until at least 1999, and Pioneer, after the merger in 1997, could have commenced an action until the expiration of the limitation period to recover the royalty payments. However, the Commission stated these were issues for a Kansas court to decide. The Commission accordingly held that if, in a suit by a producer against a royalty owner where no ongoing contractual relationship exists, a court were to hold that the statute of limitations barred the action, that producer would be in a position to seek adjustment relief from the Commission.

47. Here, once the D.C. Circuit held in August 1996 that producers must make refunds for the 1983-1988 period, Pioneer has not shown that it (or its predecessor Mesa) could not have instituted suit in Kansas against at least one royalty owner for recovery of the excess royalty payments, and thereby obtained a ruling whether a Kansas statute of limitations barred recovery. We see nothing in the two court decisions relied on by Pioneer that makes it so clear that a Kansas statute of limitations had already run that we should grant Pioneer its requested relief absent a court decision specifically on this issue. In fact, we believe that, if anything, those decisions would support a finding that the statute of limitations did not start to run until the Court's August 1996 decision. The two cases cited by Pioneer involved a situation where the Kansas state commission had required the pipeline to pay producers for purchases of natural gas produced in Kansas a minimum rate that was higher than the contract price. The producers had paid royalties to the royalty owners based on the higher price. The United States Supreme Court, on January 20, 1958, held that the lower contract price applied. In *Panhandle Eastern* the pipeline sued to recover the resulting overpayment from the producer but did not perfect

[37] 86 FERC ¶ 61,163 at 61,576.

service until more than three years after the Supreme Court decision. The court affirmed the ruling that the Kansas 3-year statute on implied contracts applied, stating that the sole basis for recovery must be found in a contract implied in law requiring a person who has been unjustly enriched through a mistake in law to make restitution. The court further found that the cause of action accordingly arose when the Supreme Court issued its decision, so that the statute of limitations expired on January 20, 1961, three years after the Supreme Court's January 20, 1958 decision. In the *Waechter* case, the same natural gas contracts were at issue as in *Panhandle Eastern*. In *Waechter*, which, among other issues, involved the claim by the producers to recover the excess royalty payments they had made to the property owners based upon the higher price ordered by the Kansas commission, the Kansas Supreme Court followed the *Panhandle Eastern* ruling as to when the claim arose. The Court noted that while the statute barred an action by the producers brought after January 20, 1961, it did not extinguish the claim, which, for example could be used as an offset.

48. Pioneer argues that the Commission should find, based on these court decisions, that the applicable Kansas statute of limitations for suits against royalty owners to recover the excess royalty payments started to run in 1983, when the first challenge to the reimbursement was filed with the Commission. Pioneer points out that in *Public Service of Colorado*, 91 F.3d at 1990, the Court stated that "the status of the Kansas tax was expressly drawn into question in 1983 when Northern first petitioned the Commission for a ruling that producers could not lawfully recover the tax under § 110." Pioneer concludes that the Commission has erred in refusing to allow producers to use the Kansas statute of limitations to meet the *Wylee* uncollectibility standard absent a holding by the Kansas courts that the statute has run.

49. However, we do not think it obvious that the court precedent cited by Pioneer would inevitably lead to the conclusion that either the three or five year Kansas statute of limitations started to run in 1983. In those cases, the courts found the statute of limitations started to run only after the Supreme Court decision which finally resolved that producer should only have been charged the pipeline the contract price and not the higher minimum rate. Obviously, the issue of which price should have paid had been drawn into question well before the Supreme Court's decision. Here, the analogous date for any cause of action by Kansas producers for return of any excess royalty payments for the 1983-1988 period would appear most likely to be the date the United States Supreme Court denied the petitions for certiorari of the D.C. Circuit's decision in *Public Service*, or May 12, 1997. It was only on that date that it was finally decided that producers could not retain the *ad valorem* tax reimbursements. This would have given Pioneer at least three years from that date to bring suit in Kansas for recovery of the royalty payment from at least one producer, so as to obtain a definitive ruling by the Kansas courts on this issue.

50. In these circumstances, the Commission continues to believe it has been appropriate to hold that the statute of limitations aspect of *Wylee* has not been met in the absence of a ruling by a Kansas court that the Kansas limitations period barred any action by a producer to recover from the royalty interest owner the tax reimbursement it had paid to that owner after the court's decision. Producers have been aware of the Commission's *Wylee* standard from the outset of *ad valorem* proceedings. Given the necessity of a definitive ruling from the Kansas courts as to how it interprets the Kansas statute of limitations, it was the producer's obligation to obtain such a ruling, and not leave it to the Commission to express its view on how the Kansas courts would apply that law to the *ad valorem* refund issue. In this case Pioneer has not shown that it ever requested recovery from a single royalty owner, let alone instituted legal proceedings.

51. We again note as we did in our discussion of the statute of limitations issue in *Public Service Commission,* 87 FERC ¶ 61,174 (1999), that producers cannot simply claim the statute of limitations would prevent recovery from the royalty owners if they could have taken steps to preserve their right against non-current royalty owners. In that order the Commission cited *Shell Offshore Inc. v. FERC*, 858 F.2d 1147 (5th Circuit 1988), involving the uncollectibility of Btu refunds under the *Wylee* standard, where the Court approved the Commission's analysis of the statute of limitations as a defense to the refund obligation. The Court stated, at 1152, that much more must be presented to demonstrate uncollectibility than merely the expiration of a statute of limitations:

> [P]roducers must still show, under the uncollectibility criteria, that they took *every reasonable opportunity* to protect their rights. … [A] statute of limitations does not lead inexorably to the conclusion that an automatic waiver of all royalty overpayments … is appropriate. (emphasis added).

Pioneer offered no evidence that it had satisfied this requirement.

52. Pioneer's request also ignores the ALJ's ruling that regardless of when the statute may have commenced to run, Pioneer had not shown that it did not have a continuing contractual relationship with royalty owners so that it could not use a setoff to recover the reimbursement. In fact, as the ALJ stated, in *Plains Petroleum Company v. First National Bank,*[38] the Kansas Supreme Court had remanded a lower court decision

[38] 274 Kan. 74, 49 P.3d 432 (2002).

because it had not ruled on that question.[39] Moreover, the *Waechter* decision cited by Pioneer suggests that the Kansas statutes of limitations do not bar recovery of debts in this manner. Thus, even if the statute of limitations commenced on December 1, 1993 or earlier, we see no basis for granting a waiver of the royalty owner portion of the refund obligation.

53. Finally, Pioneer cites to the decision by the ALJ in *Panhandle*, where he granted a partial adjustment with respect to the royalty interest owner refund and it requests that the Commission do so here. However, the Commission reversed that part of the *Panhandle* I.D. in an order issued on June 2, 2004, after Pioneer filed its request for rehearing here. The Commission's *Panhandle* order stated:

> However, we also find that the factors referred to by the ALJ to grant a waiver of a portion of the refund do not provide a ground for an arbitrary reduction in the refund amount. A number of the factors the ALJ relied upon are mere speculation, and others are similar to the reasons Pioneer argues justifies granting a complete waiver, which argument we have rejected. Accordingly, we reverse the ALJ on this issue, and will require Pioneer to include the entire amount of the royalty interest owner's portion of the refund.[40]

Similarly, we deny rehearing here, and will not grant a waiver of the royalty interest owner's portion of the refund.

D. The Denial of Equitable Relief

54. Pioneer urges the same factors on rehearing that it urged in its exceptions as a basis for the grant of equitable relief. The Commission rejected those factors. Pioneer also argues that the March 30 Order erred in relying on the Commission's decision in *Burlington* in stating that "if it finds no merits in arguments to relieve the producer of the refund obligation, they cannot be a basis for relief under NGPA section 502(c)." Pioneer

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[39] In the subsequent settlement, producers agreed to waive their claims against royalty owners and thus the litigation would be terminated. Southern Star Central Gas Pipeline, Inc., Docket Nos. RP98-52-000, *et al.*, "Joint Petition of KCC, MoPSC and Indicated Producers for Approval of Modified Settlement" (December 17, 2003); Panhandle Eastern Pipe Line Co., 105 FERC ¶ 63,038 at P 20 (describing modified Article II) (December 11, 2003).

[40] 107 FERC¶ 61,239 P 49.

asserts that this case differs because in *Burlington* the producer did not contest the factual basis of the refund but relied on a settlement, while here Pioneer has challenged the refund amount.

55. The March 30 Order addressed and rejected this argument stating:

> Finally, Pioneer's attempt to distinguish Burlington on the grounds that there the producer did not contest that there was an MLP violation, while here Pioneer has, is logically inconsistent. Disputing whether there was an MLP violation does not have any relevance as to whether if there was such a violation, a private settlement between the producer and the pipeline which the Commission never approved, could relieve that party of its obligation to refund amounts collected in excess of a statutory MLP, which excess had been passed on to the pipeline's customers. Thus, we find no error in the ALJ's ruling that the Mesa Settlement does not relieve Pioneer of its Kansas ad valorem tax refund liability. [41]

56. Pioneer argues that the fact that relief has been granted to hundreds of other producers in settlements is a basis of granting equitable relief to it here. It contends that some of the factors that the Commission relied on in approving the settlement, such as the complexity of calculating the refunds, support the grant of at least a partial waiver of Pioneer's refund obligation.

57. The requirement that producers refund the Kansas *ad valorem* tax reimbursements that resulted in the producer's receiving more than the MLP for the period commencing in 1983 was ordered by the Court in the 1996 *Public Service* case. The Court stated:

> Absent detrimental and reasonable reliance, anything short of full retroactivity (i.e., 1978) allows the producers to keep some lawful overcharges without any justification at all. The Court strongly resists the Commission's implication that the Congress intended to grant the agency the discretion to allow so capricious a thing. Still, we do not require refunds of taxes recovered with respect to production before October 1983 because there is before us no controversy over those monies.[42]

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[41] 106 FERC ¶ 61,316 P 41.

[42] 91 F.3d at 1490.

58. In implementing the Court's *Public Service* decisions, the Commission addressed the producers' request for adjustments under NGPA section 502(c) claiming it would be inequitable to require interest to be included in the refund calculation. The Commission rejected that argument in the September 10, 1997 *Public Service* order, 80 FERC ¶ 61,264, *reh'g denied,* 82 FERC ¶ 61,058 (1998) and explained that since the Court had rejected the Commission's reasons why the refund obligation should commence in 1988, there was no basis to grant equitable relief for that period for the same reason that the Court had already rejected. The Commission also rejected other argument by producers that adjusting the refund amount was warranted.

59. The Court, in *Anadarko, supra*, affirmed the Commission's rulings that equitable adjustment under NGPA section 502(c) were not appropriate. The Court stated:

> The producers have a list of 'equitable' reasons why the Commission should have relieved all of them of having to pay interest: the litigation has gone on forever, the Commission is responsible for much of the delay; the producers relied on the Commission's settled view that the Kansas ad valorem tax was a severance tax. We think the Commission rightly brushed these objections aside.[43]

Pioneer's arguments are no different than those previously rejected, and we see no reason to change our ruling denying equitable adjustment to the refund owed.

60. Finally, it is true, as Pioneer contends, that the Commission has approved settlements which granted partial adjustments of the refund amount. However, in those situations, the settlement was not contested by any potential beneficiary of the refunds, nor by affected state regulatory commissions. In this case, MoPSC has opted out of the settlement, as it was entitled to do, and is seeking recovery from Pioneer of the full amount of the claimed refund. Pioneer was a party to that settlement, and as such, received a significant reduction in the amount of its non-MoPSC refund obligation.[44] The Commission will not arbitrarily further reduce the refund amount where there is no basis to do so.

[43] 196 F.3d at 1268.

[44] Pioneer's refund obligation was reduced by in excess of $5,000,000.

II. MoPSC's Rehearing Request

61. In March 1998, just before producers were required to pay the amount of the Kansas *ad valorem* tax refund that the pipelines claimed were due, Pioneer offered in a letter to Southern Star to make partial payment to Southern Star of the amount that Southern Star claimed upon the condition that Southern Star guarantee the return of any amount that was ultimately determined Pioneer did not owe. Pioneer also filed with the Commission a Petition for Adjustment Relief, Docket No. SA98-33-000, limited to a portion of the refund amount claimed by Southern Star. When Southern Star rejected its proposal, Pioneer paid the amount claimed by Southern Star into an escrow account. The interest rate for the funds in the escrow account is less than the interest rate prescribed by the Commission's regulations (the FERC interest rate). At issue is whether Pioneer is obligated to pay an additional amount that results from applying the FERC interest rate to the funds in the escrow account.

62. The ALJ held that only the disputed amount, consisting of the royalty interest owner and interest portions of the claimed refund, should have been paid into the escrow account by Pioneer in 1998, and would be subject to the escrow interest rate, but the higher FERC interest rate would be applicable to the balance of the fund paid into the escrow account.[45] The March 30 Order held that Pioneer should not be required to pay the higher FERC interest rate on any amount that it had paid into the escrow account. The order stated that while it was true that in 1998 Pioneer seemed to dispute only a portion of the claimed refund, subsequently its position was that it had no Kansas *ad valorem* tax refund liability, and even if it was liable, the amount was substantially less than the amount Southern Star claimed it owed. Moreover, in this case, Pioneer's payment into the escrow account satisfied many of the reasons why interest is an integral part of the refund.

63. MoPSC seeks rehearing on this issue. It argues that the order erred because it is clear that the amount Pioneer placed in escrow in 1998 was not limited to amounts that were "in dispute," but also covered refunds that Pioneer effectively admitted that it did owe under the Commission's rulings, but which rulings Pioneer thought were erroneous. MoPSC refers to the Petition for Adjustment Relief that Pioneer filed with the Commission in March 1998 in Docket No. SA98-33-000, the same time when Pioneer made the payment into the escrow account. It contends that this petition clearly establishes that the only subjects that Pioneer thought still "subject to pending litigation"

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[45] The difference is a significant amount, approximately $1.5 million.

before the Commission were principal and interest relating to (1) royalty amounts; and (2) pre-October 4, 1983 production. MoPSC argues that only these limited amounts are entitled to the escrow interest rate, and the balance should be subject to the FERC interest rate.

64. MoPSC asks that the Commission limit the amount that Pioneer was entitled to escrow, and not pay the pipeline, as only the amounts relating to issues that the Commission had not ruled upon when Pioneer made the escrow payment. MoPSC contends that, by considering arguments Pioneer subsequently put forward, the Commission "condones Pioneer's decision to delay appropriate refunds to customers while it formulated (meritless) defenses after the fact."[46] It argues that when the Commission allowed producers to make payments into an escrow account, the Commission narrowly defined the amount "in dispute" to encompass only computational disputes and legitimately disputed issues, and the March 30 Order here disregards the Commission's definition.

65. MoPSC also contends that the March 30 Order erred in concluding, at P 55, that "[t]he reasons advanced why interest is to be included in calculating the refund are satisfied by applying the escrow rate to the refund." MoPSC argues that in reaching this conclusion, the Commission did not give adequate weight to the interest of the wrongfully overcharged customers.

66. We deny rehearing since the March 30 Order considered all these arguments in concluding that Pioneer would not be required to pay any additional amount of interest that would result if the higher FERC interest rate was held to apply to some of the funds in the escrow account.

67. The same issue was present in *Panhandle*. There, the ALJ, as the March 30 Order here, found that the escrow account interest rate satisfied the interest aspect of the refund obligation. The arguments MoPSC urges in its rehearing request here are similar to the arguments raised by MoPSC and Staff in their exceptions to the ALJ's decision in *Panhandle*. The Commission affirmed the ALJ in *Panhandle,* and the Commission's rationale there is equally applicable here and we will not repeat all of what was stated therein. However, it is worth repeating the core of the Commission reasoning in *Panhandle,* at P 33, which stated:

> [T]he reasons advanced why interest is included in calculating the refund are satisfied by applying the account escrow rate of interest. When the refund is deposited in the escrow account, that party no

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[46] MoPSC rehearing request at 7.

> longer had "the benefits which were available to the companies which collected excessive rates." Similarly, once that party paid the refund into the escrow account, there is no longer an incentive for that party to prolong the litigation, which is another reason advanced to justify imposition of interest. As we noted in the March 30 Order, [at P 55], since Pioneer claimed it did not owe the amount claimed as owing, there would be an incentive to Pioneer to finalize the amount as soon as possible so it could recover the funds from the escrow account.

68. In *Panhandle,* the Commission further explained:

> The Commission is not denying customers receipt of interest, the only issue being what interest should apply in the period the funds were in escrow since the FERC interest rate applied to the prior period. The fact that the FERC interest rate was higher should not be the determining factor. Considering all the factors, we find that applying the escrow account interest rate is consistent with the rationale for including interest in the refund obligation.[47]

69. We also reject the contention that the March 30 Order is contrary to the Commission's order in *Plains Petroleum*, 84 FERC ¶ 61,140 (1998) cited by MoPSC. In that case, a producer disputed its refund obligation for a certain period when it was a subsidiary of another company claiming that its parents was liable for that refund (Period I) and also disputed the amount claimed it owed in Period II when it was an independent company. The producer did not pay the refund relating to Period I, but moved for a ruling that it was not liable for the refund. In *Plains Petroleum*, the Commission rejected the producer's argument that it was not liable for the refund in Period I. As to the refund in Period II, the producer had paid a portion of the refund the pipeline claimed, and requested permission to pay into an escrow account the amount of the refund it disputed. After the Commission had ruled on certain refund issues, the producer paid an additional amount to the pipeline and sought to defer payment of the amount in the escrow account relating to the royalty owner interest portion, as to which it sought to defer payment for a year. The Commission's entire discussion of the escrow issue was the statement that the producer's action was consistent with the Commission's policy on payment into an escrow account.

[47] 107 FERC ¶ 61,239 at P 26.

70. In *Plains Petroleum* the producer did not pay the refund it owed for Period I, which it disputed, either to the pipeline or into an escrow account, but awaited the Commission ruling on the issue of liability. As to that amount, the producer would be liable for the FERC interest rate until it paid the refund, but there was no assurance of payment. Here, in contrast, Pioneer paid the entire amount claimed as owing into an escrow account pending Commission ruling on the liability issue, so there was no doubt about payment once there was a Commission ruling.

71. There was no issue in *Plains Petroleum* as to what interest rate applied to the amount paid into the escrow account. The Commission approval of the producer's conduct in *Plains Petroleum* is not to be considered a ruling that all producers had to follow that procedure. The March 30 Order recognized that when Pioneer paid the claimed refund into an escrow account, it was not disputing the entire amount, but that subsequently it did challenge the refund obligation based upon the Mesa settlement. We do not accept MoPSC's contention that the Commission should impose the FERC interest rate for the period until this defense was raised by Pioneer. Moreover, MoPSC argues, once the Commission ruled on the "settlement defense" in 1998 in *Anadarko*,[48] Pioneer should have paid the refund from the escrow account, and the FERC interest rate would apply from that time on. The Commission did not intend the escrow procedures to be so complicated. While the Commission has ruled against the producer's claim that a prior settlement relieves the refund obligation, a producer can not be faulted for raising it, and we will not impose on Pioneer a further interest obligation as MoPSC requests.

72. We again wish to emphasize that the FERC interest rate applied to the refund Pioneer owed until the funds were paid into the escrow account. At issue is the claim that Pioneer should be liable for an additional amount of interest because the FERC interest rate was higher than the escrow account rate of interest. The escrow account rate of interest would be less because the purpose of the escrow account is to assure that payment will be made when the condition for payment is satisfied.

73. MoPSC does not challenge the Commission's reasoning that payment into the escrow account satisfies a number of the reasons why interest is a component of the refund obligation. Rather, it argues that giving consumers the highest possible interest is

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[48] Anadarko Petroleum Co. v. Pan Energy Pipe Line Co., 85 FERC ¶ 61,090 (1998), *reh'g denied*, 86 FERC ¶ 61,040 (1999).

the only factor to be considered. We do not agree, and for the reasons stated above, believe that using the escrow interest rate is fair to all parties, and deny MoPSC's rehearing request.[49]

The Commission orders:

(A) The requests by Pioneer and MoPSC for rehearing are denied.

(B) Pioneer is directed to make payment of the refund within 15 days of this order.

By the Commission.

(S E A L)

Linda Mitry,
Acting Secretary.

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[49]The March 30 Order referred to the interest rate issue in another refund context where the Commission held that the escrow account interest would apply, stating:

> The Commission agrees that the only interest which should be refunded on escrowed amounts should be the accrued interest in the escrow account, since first sellers did not have the use of this money and since an escrow procedure protects the interests of both the consumer and the seller. The Commission believes these are valid reasons for limiting the interest obligation for money paid into escrow to that interest which accrued in the escrow account on the money required to be refunded. FERC Stats. & Regs., Regs. Preambles (1982-1985) ¶ 30,597 at 31,148 (1984) (citation omitted).